IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 448.

UNITED STATES OF AMERICA,
Appellant,

v.

McKESSON & ROBBINS, INCORPORATED,
Appellee.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM.

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McKesson & Robbins, Incorporated ("McKesson"), the appellee, hereby moves under Revised Rule 16(c) to affirm the judgment appealed from on the ground that the question presented is so unsubstantial as not to need further argument.

Statement.

The appeal involves only the right of McKesson as a manufacturer of brand named drug products to fair trade protection on such products, which are distributed in fair and open competition with similar brand named merchandise sold by competing manufacturers. The McKesson products are "fair traded" in states where this is lawful

under the authority of the Sherman Act,[1] as amended by the Miller-Tydings Act,[2] and under the McGuire Act.[3]

Like most manufacturers in the United States, McKesson does not follow any single method of distributing its brand named products. By far the major portion is sold to retailers through McKesson's own 74 wholesale divisions. These divisions sell a complete line of drug store products, of which McKesson items are only a small part. McKesson brand named merchandise is also sold by the manufacturing division directly to some retailers, largely chain stores and other volume purchasers.

A small amount of McKesson's brand named products is also sold by the manufacturing division to other wholesalers, but only $283,462 out of annual sales of $11,000,000 were so made to wholesalers whose trading areas materially overlapped those of McKesson's wholesale divisions.[4]

Fair trading of McKesson brand named merchandise is carried out in the usual way through minimum resale price contracts which are made by McKesson as a manufacturer with (a) wholesalers and (b) retailers. These fair trade contracts run vertically—that is downward following the course of the product from McKesson *as a manufacturer* to wholesaler to retailer.

McKesson, like other manufacturers who produce and sell brand named merchandise, has been marketing and fair trading in this general manner since shortly after the enactment of the Miller-Tydings Act over eighteen years ago.

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[1] Act of July 2, 1890, 26 Stat. 209, 15 USC 1.

[2] Act of August 17, 1937, 50 Stat. 693.

[3] Act of July 14, 1952, 66 Stat. 632.

[4] The sales reported were made in the fiscal year ending June 30, 1952. McKesson wholesale divisions also made "courtesy sales" of McKesson brand named products in small amounts to other wholesalers who either carry only minimum stocks or do not stock McKesson products to enable them to fill orders. Those sales aggregated only $200,000 in that year for all 74 wholesale divisions.

Summary of Argument.

It is the Government's bald contention that a manufacturer of brand named merchandise necessarily loses his right to statutory fair trade protection if he himself participates in any degree as a wholesaler in the distribution of his own products, even though the products are sold in open competition with the competing brands of others.[1]

This contention, we believe, is manifestly unsubstantial, both as a general proposition of law and as applied to the particular facts of this case.

As a general proposition the argument depends on narrow verbalism. It ignores economic realities and imputes a similar disregard to Congress. In fact, as the Federal Trade Commission has recently demonstrated with a wealth of documentary evidence, few manufacturers who sell in interstate commerce exclude themselves from the processes of distribution; most of them are also wholesalers or retailers, or both. Congress knew this when it passed the fair trade legislation.[2] To hold with the Government, therefore, would be to exclude from the statutes all but a small segment of the producers of competitive brand named merchandise and to limit fair trade to the unusual case. The exception would thus absorb the rule.

On the specific record in this case, there was shown to be no substantial competition on the same functional level between McKesson and any of the parties with whom it

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[1] This is the Government's vestigial claim on a complaint which was served before passage of the McGuire Act and was largely rendered moot by that Act.

[2] The intended application of the statutes was so clear that despite the widespread practice of manufacturers to engage in distribution activities at all levels, the Justice Department did not even suggest for fifteen years that such a manufacturer would be excluded from the protection of the statutes.

has made fair trade contracts. This fact alone justified dismissal of the complaint in the district court. In our view, therefore, this particular record does not present an adequate occasion for this Court to consider and determine questions having such possible far-reaching economic and social consequences.

Argument.

The decision of the District Court is clearly correct. There is no sound reason, economic or otherwise, to deny to a manufacturer the right to fair trade its brand named products at the wholesale level simply because it distributes such products through its own wholesale outlets as well as through independent wholesalers, while at the same time permitting that right to a manufacturer of competing brand named products who distributes entirely through independent wholesalers. Neither the Miller-Tydings Act nor the McGuire Act was intended so to differentiate between manufacturers. The almost identical language of both statutes upon which appellant rests its entire case, when read in context with the whole of such statutes, evidences a plain intention to prohibit contracts of a horizontal nature only when made between persons "in competition with each other at the same functional level,"[1] not fair trade contracts of the vertical type "between a producer or distributor, on the one hand, and their customers on the other."[2]

1. Two fundamental principles of fair trade demonstrate that the appellant's case is without substance. The

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[1] Cf., *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 389.

[2] Cf., *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 724.

first is that under all fair trade statutes no manufacturer is entitled to "fair trade" his own brand products unless they are sold in free, fair and open competition with similar brand products manufactured by others. The second principle is that fair trading is legalized price fixing, when so confined to competitive brand named products of a single manufacturer. Such price fixing necessarily results in the elimination of price competition among the outlets of one manufacturer's products on down the line of distribution, usually to the ultimate consumer. No different economic effect results when the manufacturer is also at times a distributor.

Thus the fair trade statutes rely on *brand versus brand competition* in the marketing of similar products of competing manufacturers to keep the resale prices competitive and at reasonable levels. They do not at all depend on price competition among the marketing outlets of a single manufacturer. The manufacturer, so long as he competes with other manufacturers, may eliminate price competition among his selected outlets—whether they be his own or independent.

So long as brand versus brand competition exists among products of competing manufacturers, consumer acceptance is obtained by quality of product and price advantage. Integration of manufacturing and wholesaling activities will not induce consumer acceptance of a less attractive or more expensive brand.

2. The fair trade contracts involved here are precisely the vertical type permitted by the statutes. Each faces downward between a manufacturer and a distributor acting in the relationship of producer and reseller of brand merchandise. They are to be distinguished from the illegal, horizontal type of agreement between manufacturers of

competing products, or between wholesalers of competing products, or retailers of such products, fixing the prices at which *two or more* competitive products are to be sold. These latter contracts, which are extrinsic to the vertical process of marketing a single product are not protected because they destroy brand versus brand competition.[1]

The obvious fallacy in the doctrinaire assertions on page 10 of the Jurisdictional Statement is that they ignore this requirement that there be competition among brands. For every manufacturer of a competitive product, whether or not he is also a wholesaler, must meet the price competition of manufacturers of similar competitive products, regardless of the degree of efficiency of his wholesale outlets or what his profit-making pattern might be. No manufacturer, integrated or not, of a competitive brand product can afford to fix an arbitrary high price for his product. If he did so he would price himself out of the market.

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[1] As Senator Humphrey, the leading proponent in the Senate of the McGuire Act, said in the debate on that act (98 Cong. Rec. 8870):

> "In general, the test of whether a resale price maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, the test of whether a resale price maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.
>
> "It is important to keep this distinction in mind, because many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.
>
> "Under the bill, such firms may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trade-marked or branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers."

Despite full opportunity to present facts showing an additional restraint, the appellant at the trial of this case neither proved nor produced evidence to prove that integration resulted in higher prices to the retailer or to the consumer.

3. The interpretation of the statutes urged by the appellee would result in the grant of the power to fair trade being substantially swallowed up by the exceptions, and would completely frustrate the intent of Congress. We find, for example, that a study of the Censuses of Business by Professors Maynard and Beckman of Ohio State University[1] reveals that 22% of all manufactured goods is wholesaled through outlets owned or operated by the manufacturers as compared with only 25% through independent wholesalers. The other 53% represents direct sales to industrial and other large users, to retailers, both manufacturer operated and independently owned, to consumers, and to others than wholesalers.

The Federal Trade Commission similarly found that

> ". . . the practice of selling exclusively through 'regular channels' of distribution is almost becoming the exception rather than the rule. Sound business or economic reasons may justify such methods of distribution."

This language is a portion of the Commission's documented economic decision in *Eastman Kodak Company*, 3 CCH Trade Reg. Rep. (10th Ed.), par. 25,291, holding under the McGuire Act that a manufacturer who was also a retailer could fair trade at the retail level. The Commission carefully reviewed the McGuire Act, its legislative history, and the relevant authorities, none of which sup-

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[1] *Principles of Marketing*, Fifth Edition, 1952, pages 40, 41.

ports the appellee's position. It considered statistics demonstrating the universal practice of manufacturers to operate outlets of their own at all levels of distribution and also to distribute through independently owned outlets. It concluded that it would be contrary to Congressional intent, unsupported by authority, and unrealistic in the light of known marketing methods to give the McGuire Act the interpretation now being urged by the appellee.

As the Federal Trade Commission stated in the concluding paragraphs of its decision:

> "The interpretation of the statute now being suggested by counsel in support of the complaint comes rather late. It would require thousands of manufacturers, if they want to fair trade, to make major changes in their present marketing methods with uncertain but admittedly large economic consequences.
>
> "It would require the Commission to rely on an unrealistic reading of the proviso in face of the fact that there is nothing whatsoever in the legislative history to suggest that Congress intended to discriminate against partially integrated concerns.
>
> "Whatever this Commission or anyone else may think about the desirability or wisdom of eliminating price competition in a fair-traded product, that feeling must be laid aside. By the enactment of the Miller-Tydings and McGuire Acts, sanctioning the enforcement of State fair-trade laws, Congress declared that the practice was not unlawful and not against the public interest."

This decision represents the unanimous determination (one Commissioner not participating) of the administrative agency charged by law with the duty of administering the Federal Trade Commission Act, including the McGuire

Act. It is entitled to great weight. See *United States* v. *Jackson*, 280 U. S. 183. It further demonstrates the correctness of the District Court's decision.

We respectfully submit, therefore, that the appellant presents no substantial question for review by this Court, and that the judgment of the District Court should be affirmed.

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